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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LANCE R. MARTIN,
12 CDCR #E-17299,

13 Plaintiff,

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15 vs.
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19 CULINARY COOK POST;
20 F. RUNAS; SERGEANT RUTLEDGE;
21 LIEUTENANT ALLAMBY;
22 K.A. SEIBEL,
23

24 Defendants.
25

Civil 15cv0472 BEN (JMA)
No.

ORDER:

**(1) DENYING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION [ECF No. 3];**

**(2) GRANTING PLAINTIFF'S
MOTION TO PROCEED *IN*
FORMA PAUPERIS, IMPOSING
NO PARTIAL FILING FEE AND
GARNISHING \$ 350 BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[ECF No. 2]; and**

**(3) DISMISSING COMPLAINT AS
FRIVOLOUS AND FOR FAILING
TO STATE A CLAIM PURSUANT
TO 28 U.S.C. §§ 1915(e)(2)(B) &
1915A(b)**

I.

PROCEDURAL HISTORY

26
27 Plaintiff, Lance R. Martin, a state prisoner currently incarcerated at the Richard
28 J. Donovan Correctional Facility ("RJD") and proceeding in pro se, has filed a civil

1 rights Complaint pursuant to 42 U.S.C. § 198. (ECF No. 1). Plaintiff has also filed a
 2 certified copy of his inmate trust account statement, which the Court has liberally
 3 construed as a Motion to Proceed *In Forma Pauperis* (“IFP”), pursuant to 28 U.S.C.
 4 § 1915(a), along with a Motion for Preliminary Injunction. (ECF No. 3.)

5 II.

6 MOTION FOR PRELIMINARY INJUNCTION

7 Plaintiff has filed a Motion for Preliminary Injunction pursuant to FED.R.CIV.P.
 8 65(a). Rule 65 of the Federal Rules of Civil Procedure provides that “the court may issue
 9 a preliminary injunction only on notice to the adverse party.” FED.R.CIV.P. 65(a). As
 10 a preliminary matter, Plaintiff’s Motion for Injunction does not comply with Rule 65(a)’s
 11 important procedural notice requirement. Here, Plaintiff has not demonstrated that his
 12 Complaint, or his Motion have been served on any named Defendant.

13 Plaintiff’s Motion does not comply with this elemental procedural requirement of
 14 Federal Rule of Civil Procedure 65(a). Thus, the Court must **DENY**, without prejudice,
 15 Plaintiff’s Motion for Preliminary Injunction (ECF No. 3) pursuant to FED.R.CIV.P.
 16 65(a).

17 Even if Plaintiff had properly served Defendants with notice of this Motion, this
 18 Motion would be denied. “A preliminary injunction is an extraordinary remedy never
 19 awarded as of right.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24
 20 (2008) (citation omitted). “The proper legal standard for preliminary injunctive relief
 21 requires a party to demonstrate ‘that he is likely to succeed on the merits, that he is likely
 22 to suffer irreparable harm in the absence of preliminary relief, that the balance of equities
 23 tips in his favor, and that an injunction is in the public interest.’” *Stormans, Inc. v.*
 24 *Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter.*, 555 U.S. at 20). As set
 25 forth in detail below, the Court finds that dismissal of this action for failing to state a
 26 claim and as frivolous is appropriate following sua sponte screening. Therefore, Plaintiff
 27 is unable to show, for purposes of his Motion, that he is “likely to succeed on the merits.”
 28 *Id.*

1 **II.**

2 **MOTION TO PROCEED IFP**

3 All parties instituting any civil action, suit or proceeding in a district court of the
 4 United States, except an application for writ of habeas corpus, must pay a filing fee of
 5 \$400. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff's failure to
 6 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
 7 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez*
 8 *v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if a prisoner, like Plaintiff, is
 9 granted leave to proceed IFP, he remains obligated to pay the entire fee in "increments,"
 10 *see Williams v. Paramo*, ___ F.3d ___, 2015 WL 74144 at *1 (9th Cir. 2015), regardless
 11 of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor*
 12 *v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

13 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
 14 ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the
 15 trust fund account statement (or institutional equivalent) for the prisoner for the six-
 16 month period immediately preceding the filing of the complaint." 28 U.S.C.
 17 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
 18 trust account statement, the Court assesses an initial payment of 20% of (a) the average
 19 monthly deposits in the account for the past six months, or (b) the average monthly
 20 balance in the account for the past six months, whichever is greater, unless the prisoner
 21 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution
 22 having custody of the prisoner then collects subsequent payments, assessed at 20% of
 23 the preceding month's income, in any month in which the prisoner's account exceeds
 24 \$10, and forwards those payments to the Court until the entire filing fee is paid. *See* 28
 25 U.S.C. § 1915(b)(2).

26 _____
 27 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after
 28 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a)
 (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule) (eff. May 1,
 2013). However, the additional \$50 administrative fee is waived if the plaintiff is
 granted leave to proceed IFP. *Id.*

1 Plaintiff has submitted a certified copy of his trust account statement pursuant to
 2 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. The
 3 Court has reviewed Plaintiff's trust account statement, but it shows that he insufficient
 4 funds from which to pay a partial initial civil filing fee. *See* 28 U.S.C. § 1915(b)(4)
 5 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action
 6 or appealing a civil action or criminal judgment for the reason that the prisoner has no
 7 assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at
 8 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal
 9 of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack of funds
 10 available to him when payment is ordered.").

11 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP (Doc. No. 2)
 12 and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire
 13 \$350 balance of the filing fees mandated will be collected by the California Department
 14 of Corrections and Rehabilitation ("CDCR") and forwarded to the Clerk of the Court
 15 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

16 **III.**

17 **SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

18 The PLRA also obligates the Court to review complaints filed by all persons
 19 proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any
 20 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
 21 criminal law or the terms or conditions of parole, probation, pretrial release, or
 22 diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C. §§
 23 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must sua
 24 sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail
 25 to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
 26 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)
 27 (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A);
 28 *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing

1 § 1915A).

2 “[W]hen determining whether a complaint states a claim, a court must accept as
3 true all allegations of material fact and must construe those facts in the light most
4 favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting
5 that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).
6 In addition, the Court’s duty to liberally construe a pro se’s pleadings, *see Karim-Panahi*
7 *v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important
8 in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).
9 However, in giving liberal interpretation to a pro se civil rights complaint, the court may
10 not “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
11 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and
12 conclusory allegations of official participation in civil rights violations are not sufficient
13 to withstand a motion to dismiss.” *Id.*

14 Section 1983 imposes two essential proof requirements upon a claimant: (1) that
15 a person acting under color of state law committed the conduct at issue, and (2) that the
16 conduct deprived the claimant of some right, privilege, or immunity protected by the
17 Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*,
18 541 U.S. 637, 124 S. Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354
19 (9th Cir. 1985) (en banc).

20 **A. Rule 8**

21 Plaintiff’s Complaint is difficult to decipher as many of the claims Plaintiff’s is
22 attempting to allege are disjointed and incomprehensible. Rule 8 of the Federal Rules
23 of Civil Procedure provides that in order to state a claim for relief in a pleading it must
24 contain “a short and plain statement of the grounds for the court’s jurisdiction” and “a
25 short and plain statement of the claim showing that the pleader is entitled to relief.”
26 FED.R.CIV.P. 8(a)(1) & (2). Here, the Court finds that Plaintiff’s Complaint falls shorts
27 of complying with Rule 8.

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1 **B. Frivolous claims**

2 Plaintiff's Complaint also sets forth claims that appear to be delusional. A
3 complaint is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke*
4 *v. Williams*, 490 U.S. 319, 325 (1989). Plaintiff claims Defendants are "mingling [his
5 food] in liquid rendered grease" and "human waste." (Compl. at 9.)

6 A court "may take notice of proceedings in other courts, both within and without
7 the federal judicial system, if those proceedings have a direct relation to matters at
8 issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971
9 F.2d 244, 248 (9th Cir. 1992). This Court takes judicial notice that Plaintiff has made
10 nearly identical food contamination claims in actions arising when he was housed in
11 prisons located within the jurisdictional boundary of the Eastern District of California.
12 *See Martin v. Gonzales, et al.*, E.D. Cal. Civil Case No. 1:05-cv-00629-AWI-SMS; *see*
13 *also Martin v. Cope, et al.*, E.D. Cal. Civil Case No. 1:09-cv-01617-DLB. Plaintiff also
14 alleged these same claims against different Defendants in *Martin v. Giurbino, et al.* S.D.
15 Cal. Civil Case No. 3:13-cv-1430-JAH-BGS. In this matter, the District Court Judge
16 also found similar claims to be frivolous and dismissed the action. (*Id.*, ECF No. 19.)
17 Plaintiff appealed but the Ninth Circuit Court of Appeals found Plaintiff's appeal to be
18 frivolous as well. (*Id.*, ECF No. 26.)

19 Here, the Court finds the claims in Plaintiff's Complaint to be frivolous because
20 they lack even "an arguable basis either in law or in fact," and appear "fanciful,"
21 "fantastic," or "delusional." *Neitzke*, 490 U.S. at 325, 328.

22 **C. Eighth Amendment claims**

23 Plaintiff also claims that Defendants have denied him adequate medical care.
24 Where an inmate's claim is one of inadequate medical care, the inmate must allege "acts
25 or omissions sufficiently harmful to evidence deliberate indifference to serious medical
26 needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Such a claim has two elements:
27 "the seriousness of the prisoner's medical need and the nature of the defendant's
28 response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991),

1 *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir.
 2 1997). A medical need is serious “if the failure to treat the prisoner’s condition could
 3 result in further significant injury or the ‘unnecessary and wanton infliction of pain.’”
 4 *McGuckin*, 974 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104). Indications of a serious
 5 medical need include “the presence of a medical condition that significantly affects an
 6 individual’s daily activities.” *Id.* at 1059-60. By establishing the existence of a serious
 7 medical need, an inmate satisfies the objective requirement for proving an Eighth
 8 Amendment violation. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

9 In general, deliberate indifference may be shown when prison officials deny,
 10 delay, or intentionally interfere with a prescribed course of medical treatment, or it may
 11 be shown by the way in which prison medical officials provide necessary care.
 12 *Hutchinson v. United States*, 838 F.2d 390, 393-94 (9th Cir. 1988). Before it can be said
 13 that a inmate’s civil rights have been abridged with regard to medical care, however, “the
 14 indifference to his medical needs must be substantial. Mere ‘indifference,’ ‘negligence,’
 15 or ‘medical malpractice’ will not support this cause of action.” *Broughton v. Cutter*
 16 *Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S. at 105-06). *See*
 17 *also Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

18 Here, Plaintiff’s Complaint contains no comprehensible factual allegations from
 19 which any of the named Defendants could be found to be deliberately indifferent to his
 20 serious medical needs. Plaintiff claims that his “cholesterol levels have been unlawfully
 21 elevated by Defendants” which is now “causing cardiovascular disease.” (Compl. at 10-
 22 11.) Objectively, cardiovascular disease may be considered a “serious medical need.”
 23 However, there are no plausible allegations that any of the named Defendants caused
 24 Plaintiff’s alleged medical condition or failed to provide medical care.

25 Thus, Plaintiff’s Eighth Amendment inadequate medical care claims are
 26 dismissed for failing to state a claim upon which relief can be granted.

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IV.

CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Preliminary Injunction (ECF No. 3) is **DENIED**.

2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2) is **GRANTED**.

3. The Secretary of California Department of Corrections and Rehabilitation, or his designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month's income and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

4. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey Beard, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502, Sacramento, California 95814.

IT IS FURTHER ORDERED that:

5. Plaintiff's Complaint is **DISMISSED** without prejudice as frivolous and for failing to state a claim upon which relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v.*

1 *Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

2 6. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

3 **IT IS SO ORDERED.**

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5 DATED: March 16, 2015

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7 
8 Hon. Roger T. Benitez
9 United States District Judge
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